IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 707

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,
Petitioner,

Against

F. J. CHRESTENSEN.

BRIEF OF AMICUS CURIAE FOR THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Filed by the Following Members of the Model Hand-bill Ordinance Committee:

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SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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STATEMENT

The NATIONAL INSTITUTE OF MUNICIPAL OFFICERS is an organization of cities acting through their chief legal officers. The title of this chief legal officer varies throughout the nation from Corporation Counsel to City Attorney, City Solicitor, Municipal Counselor, Director of Law, etc. In 1940 the President of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS appointed a Committee to draft a model handbill ordinance which would comply with the decisions of this court in the cases of *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Schneider* v. *State*, 308 U. S. 147 (1939). It was believed that since this was a matter

affecting all cities a model ordinance incorporating the ideas and experience of a large number of city attorneys should be prepared. (One of the activities of the *National Institute* is the drafting of model ordinances on subjects of national interest to cities incorporating the most successful experience of all cities.)

In its 1940 report this Committee recommended a proposed model ordinance which, after consideration at the Annual Meeting of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, was referred back to the Committee for further study. See MUNICIPALITIES AND THE LAW IN ACTION FOR 1940, pages 187-205. In the 1941 report of this Committee it was stated in part as follows:

> "Until the questions with respect to regulation of handbill distribution raised in *Chrestensen* v. *Valentine,* 122 F. (2d) 511, decided July 25, 1941, by the Circuit Court of Appeals, Second Circuit, are determined by the Supreme Court of the United States, the Model Handbill Ordinance Committee of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS believes that it will serve no useful purpose to file at this time a detailed report dealing either with an exposition of the *Chrestensen* case or future plans of the Committee."

This Committee, therefore, comes here and files this brief in the hope of assisting the court in deciding the important questions in this case as those questions vitally affect the cities we represent. Since the briefs of the parties in this case will undoubtedly contain citation of all authorities in point, we will confine our brief to a summarized statement of the arguments which occur to us as a result of our study of handbill problems.

SUMMARY OF ARGUMENT

I. The right to distribute commercial handbills advertising one individual's business has never before been suggested as a part of the freedom of speech and freedom of the press guaranteed by the Federal Constitution.

II. City streets are constructed and maintained for the convenience and use of the public and no individual has an inherent right to use these streets for his personal business and his personal profit.

III. An impossible administrative task would be created for cities if thousands of commercial handbill advertisers can make public streets their personal place of business.

IV. If city officials can be allowed to distinguish between obscene and non-obscene handbills, they can make a decision as to whether a handbill is commercial or non-commercial.

ARGUMENT

POINT I

THE RIGHT TO DISTRIBUTE COMMERCIAL HANDBILLS ADVERTISING ONE INDIVIDUAL'S PERSONAL BUSINESS HAS NEVER BEFORE BEEN SUGGESTED AS A PART OF THE FREEDOM OF SPEECH AND FREEDOM OF THE PRESS GUARANTEED BY THE FEDERAL CONSTITUTION.

Until this case arose one cannot find a single opinion of this court referring to a claim that the right to dis-

tribute commercial handbills advertising one individual's personal business is a right protected by the constitutional guarantees against abridgement of freedom of speech and of the press. The question before this Court is therefore a novel one in which the appellee seeks to establish a new business right or "business privilege" to the free use of the streets for his personal commercial enterprise. Certainly if such a right could reasonably be said to be included in these constitutional protections the ever active minds of American businessmen would have established the "right" many years ago.

Freedom of speech, and of the press, guaranteed by the First Amendment to the Constitution of the United States of America, against abridgement by the Congress, and secured by the due process clause of the Fourteenth Amendment to citizens against infringement by the several States,—are fundamental personal rights which the citizen may enjoy and exercise free from such previous restraints upon speech and publication which had been practiced by other governments.

Nowhere throughout the classic struggle for freedom of speech, and freedom of the press,—a struggle bitterly waged between crown and commoner,—can a single instance be found in the books showing that a British subject ever laid claim to the right to take his stand in the "market place" and there distribute commercial handbills under the right of freedom of the press.

We, who subscribe our names to this brief and as friends of the Court, respectfully submit it on behalf of the member cities of NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, feel that we would be derelict in our duty to the Court and to the municipalities which make up the membership of the NA-

TIONAL INSTITUTE, if we failed to argue earnestly that there is a truly essential and fundamental constitutional difference between the historic pamphlet as symbolizing freedom of the press, on the one hand, and a mere commercial handbill as evidencing but another and newer method of attempting to use municipal highways for private business purposes, on the other hand.

As municipal counselors, we should, as indeed we do, cheerfully accept the view of the Court in *Schneider* v. *State of New Jersey*, 308 U. S. 147, and the three handbill cases decided at, and determined with the *Schneider* case,—that mere cleanliness of streets cannot—on that ground alone—support the police power of a municipality for the purpose of closing the historic "market place" to the classic pamphlet, which, throughout the British, as well as the American struggle for freedom of opinion, has played so heroic and profound a part in the development of lofty Anglo-American principles and institutions. But we, as municipal counselors, respectfully urge upon the Court that, in our humble opinion, there is no denial of freedom of expression or opinion in denying completely, or strictly regulating the use of public city streets to peddlers of handbills, "purely" commercial or hybrid, when the purpose of such handbills is to gain private profit from operating a garage or a beauty shop, a tavern or an outdoor barbecue, a boxing exhibition or a boat race, or the exhibition of an antiquated submarine.

POINT II

CITY STREETS ARE CONSTRUCTED AND MAINTAINED FOR THE CONVENIENCE AND USE OF THE PUBLIC AND NO INDIVIDUAL HAS AN INHERENT RIGHT TO USE THESE STREETS FOR HIS PERSONAL BUSINESS AND PERSONAL PROFIT.

It is a fundamental rule of law that no one has an inherent right to use the public streets for his personal commercial enterprises. No one, for example, has an inherent right to park his automobile on the public streets even in front of his own property. The streets are constructed and maintained for the convenience and use of the public. A city has no right to grant an individual the right to inconvenience the public by obstructing the public streets. Certainly one individual member of the public cannot be favored over all other members of the public by furnishing to this individual a "free rent" place to work in the city streets at the public's expense.

If the city can give a commercial handbill distributor the privilege of conducting his business in the public streets it must also let any other person conduct any other similar business the individual decides upon in the public streets. Why pay for expensive newspaper and billboard advertising when all one has to do is print up a thousand or so cheap handbills and hire a few persons to hand them out on the streets and sidewalks at places where the most people go by? To have a billboard one must secure a place on private property and pay rent therefor, as it is well settled no one has a right to hang up a billboard on or over a public street. To use newspaper advertising one must pay for the higher

expense in printing news to go along with the advertisement and the more expensive method of distribution by sale.

We do have public utilities using the public streets in a business conducted in the public interest, convenience and necessity. Surely it is not to the interest of the public that John Jones be given the right to use the public streets to hand out 50,000 handbills advertising his personal fire sale or his personal submarine. This is no convenience to the public, but purely and simply a profit scheme for John Jones. As for public necessity, there is no imagination so strong as to suggest that there is any public necessity back of commercial handbill distribution. It would seem that the public interest and convenience would best be served by keeping the streets for public use strictly, rather than allowing individuals to make the streets their personal place of business.

It seems reasonable to assume that if the principle is ever established that anyone can hand out commercial handbills on the public streets a new business will immediately be created. Printers will canvass stores, take orders for cheap commercial handbills by the thousands, and have their employees hand out the handbills, thus rendering a complete "commercial handbill service." These printers will thus be receiving a "free rent" place to carry on their business with the public paying the cleaning costs.

POINT III

AN IMPOSSIBLE ADMINISTRATIVE TASK WOULD BE CREATED FOR CITIES IF THOUSANDS OF COMMERCIAL HANDBILL ADVERTISERS CAN MAKE PUBLIC STREETS THEIR PERSONAL PLACE OF BUSINESS.

It must be apparent to all that the reaction of most persons to a commercial handbill is to throw it away either after or before reading its contents. If commercial handbill advertisers can use the public streets to ply their trade, it seems indisputable that thousands of these handbills will be thrown away to land on the streets, to pile up in and clog gutters, sidewalks, and adjoining property. Who must clean up this dirty mess? The handbill distributor? No, there is no way a city can force him to clean up his "place of business" when that "place of business" is a public street, for he would not have the equipment or the experience to carry on cleaning operations on a busy street and the city sanitation department is the only agency which can really do the job correctly. The city must do the cleaning at public expense or allow an unsanitary, unhealthy, condition to exist. The commercial handbill distributor can hand out his handbills and go home. Other business places like butcher shops for example, must pay rent and keep their shops clean in order to keep their business and to avoid violation of health regulations.

The *Schneider* decision *supra* holds that this cleaning and sanitary problem cannot be allowed to override the right to advocate a cause through a pamphlet. If *Chrestensen* prevails in this case the cleaning burdens of cities will be magnified a thousand-fold, and a free place of business will have been given to him and others in the name of freedom of the press and speech. If

Chrestensen can bring the business of distributing commercial handbills within the protection of the constitutional provisions against abridgement of the freedom of the press and speech, the next claim will be that any license or other regulatory measure to make him pay the cost of his use of the streets is prohibited by these same constitutional provisions.

If placing commercial handbill distribution upon the same dignity with non-commercial handbills can, by any stretch of imagination, give added dignity and sacredness to the freedom of the press, which it now happily enjoys in our nation, despite grim and desperate dangers which face the nation,—if commercial handbills can work such transmutation,—then we, as municipal counselors, will of necessity be forced to accept such new body of doctrine created by the alchemy of commercial profit.

Shall the public streets of our cities become spotted with peddlers, and strewn, hour by hours, day by day, month by month, throughout the year, with all sizes, colors and shapes of commercial handbills advertising any one of hundreds of articles necessary, or thought to be necessary to the comfort and enjoyment of daily life—shall all this come to pass in the name of freedom of the press? Has it ever been the rule of this Court, or has it ever been the commonly accepted sense of the American people, that a commercial handbill, distributed to increase the volume of private business, is entitled to equal recognition, in a constitutional sense, with a non-commercial handbill solely devoted to expression of opinion?

It is a well known trait of human nature that not so many of us will print up pamphlets to advocate a cause, but all of us will and do spend money to further our personal business and to increase its profits. It there-

fore seems reasonable to assume that the cleaning burden of cities would indeed be magnified a thousandfold if commercial handbills are accorded the same privileged status as the non-commercial pamphlet.

POINT IV

IF CITY OFFICIALS CAN BE ALLOWED TO DISTINGUISH BETWEEN OBSCENE AND NON-OBSCENE HANDBILLS, THEY CAN MAKE A DECISION AS TO WHETHER OR NOT A HANDBILL IS COMMERCIAL OR NON-COMMERCIAL.

It may be suggested that this particular hybrid type of handbill must be allowed or someone must pass upon whether or not it is a commercial advertisement and commercial use of the streets or a bona fide attack on city officials. We feel certain the facts, as stipulated in this case, clearly indicate that the particular handbill now before the court is purely and simply a commercial advertisement coupled with an attempt to subvert the principles of freedom of speech and freedom of the press to the personal individual gain of the submarine owner. Certainly it would not be contended that no city official can decide whether or not a particular pamphlet contains obscene matter. This being so, the mere fact that a city official must make a decision as to whether or not a particular pamphlet is primarily commercial, or primarily non-commercial, should not, in itself, invalidate an ordinance.

We do not want to be understood as saying that the mere fact that a pamphlet contains an advertisement of a meeting to which an admission is charged makes it a commercial handbill. Undoubtedly there will be cases where it will be hard to draw the line, but, if city officers are unreasonable in their decisions, the courts are always open to correct them.

CONCLUSION

We respectfully submit that distribution of commercial handbills on the public streets—and this case involves such a handbill—should be subject to regulation or prohibition by cities acting under their police powers to preserve to the public the unobstructed and unfettered use of the streets to which it is entitled.

Respectfully Submitted By The

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